(1)
Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MISSISSIPPI STATE UNIVERSITY,

Cross-Petitioner,

v.

DR. AHMAD A. VADIE,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RULE 12.5 CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

1. WHETHER THE ELEVENTH AMENDMENT BARS A SUIT GROUNDED ON A CLAIM OF "NATIONAL ORIGIN" DISCRIMINATION UNDER 42 U.S.C. 2000e(2) BY A PRIVATE PERSON AGAINST A STATE.

2. WHETHER THE ELEVENTH AMENDMENT BARS SUIT OR CONTINUATION OF A SUIT GROUNDED SOLELY ON A CLAIM OF "RETALIATION" UNDER 42 U.S.C. 2000e(3) BY A PRIVATE PERSON AGAINST A STATE.

3. WHERE THE EVIDENCE FAILS TO ESTABLISH THAT AN ADVERSE EMPLOYMENT DECISION WAS "CAUSALLY RELATED" (THE "BUT FOR" CAUSE) TO EITHER OF THE TWO PROTECTED ACTIVITIES CLAIMED BY THE PLAINTIFF, WAS IT ERRONEOUS TO AFFIRM A FINDING OF "RETALIATION" AND DENIAL OF JUDGMENT AS A MATTER OF LAW.

LIST OF INTERESTED PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b), 24.1(b) and 29.4(b) of the Rules of the Supreme Court of the United States.

1. Mississippi State University,
   Defendant/Appellant/Cross-Appellee;

2. Ahmad Vadie,
   Plaintiff/Appellee/Cross-Appellant;

3. Johnnie M. Haley,
   Co-Counsel/Counsel of Record for the Defendant/Appellant/Cross-Appellee;

4. Charles L. Guest,
   Co-Counsel for the Defendant/Appellant/Cross-Appellee;

5. Jim Waide,
   Attorney for the Plaintiff/Appellee/Cross-Appellant;

6. Solicitor General of the United States.

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The December 3, 1998 District Court Opinion denying JMOL and New Trial, set forth at Appendix B of the original Petition for Certiorari (Docket No. 00-806).

JURISDICTION

Conditional Cross-Petitioner expressly relies on Rule 12.5 of the Rules of the Supreme Court. The date of docketing of the Petition for Writ of Certiorari (Docket No. 00-806) was November 20, 2000.

While not admitting jurisdiction and not waiving Eleventh Amendment immunity, this Court's jurisdiction, if it exists, is to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 5, 2000 by Writ of Certiorari under 28 U.S.C. 1254(1).

In compliance with Rule 29.4(b), **NOTICE** is hereby provided that 28 U.S.C. 2403(a) may apply. The Circuit Court of Appeals did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL PROVISIONS

The 11th Amendment to the U.S. Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The 14th Amendment to the U.S. Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATUTORY PROVISIONS

42 U.S.C. 2000e-2(a) provides in part:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire any individual . . . because of such individual's . . . national origin. . . . "

42 U.S.C. 2000e-3(a) provides in part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . , to discriminate against any individual, . . . , because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT OF THE CASE

Conditional Cross-Petitioner (hereinafter UNIVERSITY) is an entity of the sovereign State of Mississippi.

Conditional Cross-Respondent (hereinafter VADIE) applied for a faculty position within the Chemical Engineering Department at the UNIVERSITY in 1993. [Page 3 of the Appendix to the Original Petition (hereinafter "App.")] VADIE was notified in May, 1993 that he had not been selected for the position. (App. 4)

In an April, 1994 letter to the Dean of the College of Engineering, the entire Chemical Engineering department faculty (which included multiple protected groups, including, but not limited to, one or more members of VADIE's protected national origin and racial group) emphatically stated that they did not want VADIE to be hired into their department. [Appendix I to this Cross-Petition (hereinafter App. I)] The letter contains the articulated legitimate, non-discriminatory, non-retaliatory reasons that they did not want VADIE selected for the

position. (App. I) In June, 1994, the position was filled. (App. 6)

Over eighteen months from the date VADIE was first notified of non-selection for the 1993 position, and over seven months after the position was filled, VADIE, on January 24, 1995, filed an EEOC complaint claiming "racial and national origin" discrimination as the basis for his non-selection for the 1993 position. VADIE later filed his lawsuit in June, 1995. (App. 6)

The District Judge denied the UNIVERSITY's pre-trial Motions to Dismiss or in the alternative to grant Summary Judgment and also denied the UNIVERSITY's Motions for Judgment as a Matter of Law (JMOL) during trial and post-trial, each of which included assertions of 11th Amendment immunity by the UNIVERSITY. On appeal by the UNIVERSITY, the United States Court of Appeals for the Fifth Circuit (hereinafter Appellate Court) reviewed the record, vacated the judgment of the district court against the UNIVERSITY with respect to VADIE's "race and national origin" claims relating to the 1993 position, and remanded with instructions that those claims be dismissed because VADIE's EEOC charge was untimely filed. *Vadie v. Mississippi State University*, 218 F.3d 365, at 371-72 (5th Cir. 2000). See also App. 11.

In August 1995, a Chemical Engineering faculty member died. (App. 7) Because of the loss to the department of the strong Chemical Engineering background of that particular deceased faculty member, the faculty determined that the qualifications for a replacement must specifically require a Ph.D. in Chemical Engineering, as compared to any other Engineering degree, in order to

preserve the overall academic credentials and "Chemical Engineering" expertise of the department. (App. 7)

Despite the advertisement for the position containing the requirement of a Ph.D. in "Chemical Engineering", VADIE, who did not hold a Ph.D. in "Chemical Engineering", applied for the position. (App. 7) VADIE's application package was reviewed by the Chemical Engineering Department's faculty screening committee (two of the three of which were from protected groups; Chinese and female) (T344). Two of the three screening committee members were members of the Chemical Engineering faculty who signed the April, 1994 letter stating that they did not want VADIE as a member of their department (the third member was not a faculty member at the time the letter was signed and testified that at the time that she was unaware of the history of VADIE and that she observed no evidence of retaliation or a grudge against VADIE at all). (T344, 371 and App. I) The faculty screening committee did not recommend VADIE as one of the finalists to be considered for the position. (App. 8)

In November 1995 VADIE filed his second EEOC complaint asserting that his non-selection for the 1995 position was either because of his "national origin" or that it was in "retaliation" for him having filed his "January 1995 EEOC complaint" or his "1995 lawsuit". (App. 8)

The District Court Judge erroneously allowed the jury to consider and make findings regarding the time-barred allegations of "racial and national origin" discrimination pertaining to the 1993 position simultaneously with the separate allegations of "national origin" and

"retaliation" pertaining to the 1995 position. *Vadie v. Mississippi State University*, 218 F.3d 365, at 371-72 (5th Cir. 2000). See also App. 11.

Even though faced with the erroneously multiplicious dilemma of having the barred 1993 claims of discrimination being tried on the merits at trial, the UNIVERSITY produced "legitimate, non-discriminatory" reasons for VADIE's non-selection for the 1993 position, as well as "legitimate, non-discriminatory, non-retaliatory" reasons for the 1995 determination made by the faculty screening committee. (App. 11-20, App. 27-35, and App. I)

VADIE produced no evidence of "national origin" discrimination; in fact, VADIE failed to produce even a scintilla of evidence that "national origin" played a role in the 1995 decision. *Vadie v. Mississippi State University*, 218 F.3d 365, at 372-74 (5th Cir. 2000). See also App. 13-16. The record was void of any evidence that would lead one to a conclusion that the articulated reasons given by the UNIVERSITY were false. (App. 14-16)

The Appellate Court vacated the District Court judgment with respect to VADIE's 1995 claim of "national origin" discrimination and remanded with instructions to enter judgment in favor of the UNIVERSITY on that 1995 "national origin" discrimination claim. (App. 27)

The Appellate Court erroneously upheld the District Court finding and judgment against the UNIVERSITY on the 1995 "retaliation" claim (App. 27-38), though it did overrule the district court's order with respect to the District Court's finding that the damages award was not excessive and remanded the case to the district court for a new trial on "retaliation" damages. (App. 27-38)

VADIE has now petitioned this Court for certiorari to review the Appellate Court decision, the UNIVERSITY has filed a brief in opposition to the petition, and the UNIVERSITY has simultaneously filed this Conditional Cross-Petition.

Jurisdiction in the court of the first instance was under 28 U.S.C. 1331.

ARGUMENT

The Conditional Cross-Petition for Writ of Certiorari should be granted under Supreme Court Rule 12.5 if the original Petition for Writ of Certiorari is granted.

Under Supreme Court Rule 10, the United States Court of Appeals for the Fifth Circuit, in failing to reverse in total the district court's denial of Cross-Petitioner's motions to dismiss and for judgment as a matter of law has so far departed from the accepted and usual course of judicial proceedings and also thereby has sanctioned such a departure by the district court as to call for an exercise of this Court's supervisory power.

In addition, the United States Court of Appeals for the Fifth Circuit, in failing to grant dismissal under the 11th Amendment of the "national origin" and the "retaliation" claims by a private person against a State has implicitly decided an important question of federal law that has not been, but should be, settled by this Court.

Further, the United States Court of Appeals for the Fifth Circuit decided important federal questions (See

Questions 1-3, *supra*) in a way that conflicts with relevant decisions of this Court.

Thus, under Rules 10 and 12.5 of the Supreme Court Rules, the Conditional Cross-Petition should be granted.

REASON 1

The conditional cross-petition writ should be granted because should relief be granted to the original petitioner in the form of reinstating the "national origin" discrimination claim against the conditional cross-petitioner, then the conditional cross-petitioner (hereinafter UNIVERSITY) is entitled to dismissal of the "national origin" discrimination claim based on the 11th Amendment to the U.S. Constitution.

A claim of "national origin" discrimination, alleging a violation of 42 U.S.C. 2000e-2(a), was brought by a private person against the UNIVERSITY, an entity of the sovereign State of Mississippi. The UNIVERSITY is entitled to 11th Amendment immunity and the 11th Amendment to the U.S. Constitution stands as a bar to a suit based on an allegation of "national origin" discrimination brought by a private person against a State.

Congress lacked the power under Section 5 of the 14th Amendment to abrogate the States' 11th Amendment immunity for suits based on an unidentifiable, yet totally universal, group of persons purportedly identified by Congress as being within a category named "national origin." The recent line of decisions of this Court, including, but not limited to the following, are broad enough in

sweep to serve as the basis for this Court to further delineate the limits of Congressional power with regard to the abrogation of the States' 11th Amendment immunity from suit by private persons, especially with regard to claims of "national origin" discrimination. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

The Circuit Court failed to reverse the district court's denial of the UNIVERSITY's motion to dismiss or in the alternative for judgment as a matter of law under the 11th Amendment to the U.S. Constitution. Therefore, this Conditional Cross-Petition should be granted.

REASON 2

The conditional cross-petition writ should be granted because should relief be granted to the original petitioner in the form of reinstating the original damages award, or should this Court affirm the Circuit Court's affirmation of the trial court's finding of "retaliation" and allow the original petitioner to proceed with a trial on a "retaliation damages" claim against the conditional cross-petitioner, then the conditional cross-petitioner (hereinafter UNIVERSITY) is entitled to dismissal of the "retaliation"

claim based on the 11th Amendment to the U.S. Constitution.

A claim of "retaliation", alleging a violation of 42 U.S.C. 2000e-3(a), was brought by a private person against the UNIVERSITY, an entity of the sovereign State of Mississippi. The UNIVERSITY is entitled to 11th Amendment immunity and the 11th Amendment to the U.S. Constitution stands as a bar to a suit based on an allegation of "retaliation" brought by a private person against a State.

Congress lacked the power under Section 5 of the 14th Amendment to abrogate the States' 11th Amendment immunity for suits based on "retaliation." The actions proscribed by 42 U.S.C. 2000e-3(a) are not acts of "illegal discrimination" as envisioned by the 14th Amendment to the U.S. Constitution. Instead, the prohibition is nothing more than to do nothing to interfere with the exercise by individuals of certain specified rights under 42 U.S.C. 2000e-2(a).

Even if Congress had colorable authority under Section 5 of the 14th Amendment to attempt to require or enforce such non-action by the States, considering the dates of enactment of the attempted abrogations under both 42 U.S.C. 2000e-2 and 2000e-3, Congress did not have an adequate basis upon which to determine that the States had a record of attempts to interfere with individuals attempting to exercise any rights under 42 U.S.C. 2000e-2(a), especially considering the fact that no private person had a right to bring a 42 U.S.C. 2000e-2(a) suit against the States before that point in time. At a minimum, the attempt by Congress to abrogate the 11th

Amendment under 42 U.S.C. 2000e-3(a) was not appropriate legislation as it was incongruent with and not proportional to the circumstances existing at the time of enactment.

The recent line of decisions of this Court, including, but not limited to the following, are broad enough in sweep to serve as the basis for this Court to further delineate the limits of Congressional power with regard to the abrogation of the States' 11th Amendment immunity from suit by private persons for "retaliation" under 42 U.S.C. 2000e-3(a). *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

The Circuit Court failed to reverse the district court's denial of the UNIVERSITY's motion to dismiss or in the alternative for judgment as a matter of law under the 11th Amendment to the U.S. Constitution as to the claim for "retaliation". In fact, the Circuit Court upheld the lower court finding of "retaliation." Therefore, this Conditional Cross-Petition should be granted.

REASON 3

The Circuit Court's affirmation of the trial court's denial of the conditional cross-petitioner motion for judgment as a matter of law with regard to the claim of retaliation conflicts with relevant decisions of this Court.

An adverse employment decision must be causally related to the protected activity in order to support a finding of retaliation under 42 U.S.C. 2000e-3(a). *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In the case *sub judice* the evidence is insufficient as a matter of law to establish that nexus and the Appellate Court and District Court failed to apply that "but for" standard. See the Circuit Court Dissenting Opinion at App. 27-38.

Therefore, the Conditional Cross-Petition should be granted.

CONCLUSION

This Conditional Cross-Petition for Writ of Certiorari identifies an encroachment by the District Court and the U.S. Fifth Circuit Court of Appeals onto State sovereignty that requires an exercise of this Court's supervisory power. Specifically, two of the three questions raised in this Conditional Cross-Petition are grounded on the 11th Amendment immunity of the States. Therefore, in addition to the basis under Rule 12.5, the Conditional Cross-

Petition for Writ of Certiorari should be granted, regardless of whether the original Petition is granted, as the issues surrounding the 11th Amendment immunity of the States are **JURISDICTIONAL** in nature.

The District Court and then in turn the United States Court of Appeals for the Fifth Circuit, in failing to grant dismissal under the 11th Amendment for the "national origin" and the "retaliation" claims by a private person against a State have implicitly decided an important question of federal law that has not been, but should be, settled by this Court. In addition, the United States Court of Appeals for the Fifth Circuit decided important federal questions (See Questions 1-3, *supra*) in a way that conflicts with relevant decisions of this Court.

For these reasons, the Conditional Cross-Petition for the Writ should be granted.

Respectfully submitted,

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APPENDIX I

DEFENDANT'S EXHIBIT

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April 22, 1994

Robert A. Altenkirch, Dean
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Dear Dean Altenkirch:

It has come to our attention there continues to be rhetoric relative to the desire of the faculty of the Department of Chemical Engineering to have Dr. Alex Vadie join our group. During the past academic year we have attempted to express ourselves to the Department Head and the dean, and to others concerning our feelings in this matter. We have held verbal discussions, private discussions, and have committed this matter to writing. We are now concerned that we are not being appropriately heard.

For the past two years, the College of Engineering have taken it upon themselves to devise a plan for giving

preference of available positions to persons displaced as a result of the closure of programs. An incredible amount of time was spent in the development of the document which was ultimately approved by the College of Engineering, the board, and the administration. You will remember that the faculty of the College of Engineering as well as the faculty of Chemical Engineering desired to have input into the relocation of faculty who lost their job due to the elimination of specific programs. However, there was a very distinct desire on the part of the College faculty to have the Department Head make the final selection. This action was most desirable due to friendships involved, a desire to remain anonymous and bypass personal embarrassment, and a desire to maintain highly qualified faculty. These procedures were utilized by Chemical Engineering in its search for three faculty members and were followed explicitly by the faculty and the Department. Significant time and agony were spent in the evaluations and the selections made.

Subsequent to this action, the search committee selected three additional candidates from a pool made up of the total number of candidates. Even though considered, no internal candidates were short listed or selected. Because the short listed (external) candidates had already taken jobs, it was necessary to begin again with new advertisements. The search committee again screened all the applicants and no internal candidates were short listed or selected. From these candidates, Dr. Michael Harris, a minority applicant, was selected by the faculty in concert with the Department Head and the recommendation forwarded to you and to the Provost. It would

seem these actions by the faculty of Chemical Engineering and the Department Head would provide a clear signal that all of the internal candidates that it felt would/could make contributions to the Department had been hired.

When questions arose relative to our intent with respect to Dr. Alex Vadie, you were provided a written statement signed by the entire chemical Engineering faculty which stated that the rules were indeed followed, the faculty had maximum input to the process, and the faculty were satisfied with the decisions made. It did not seem appropriate at the time and remains that way to this time that it would serve no purpose to delineate the difficulties or problems noted in each candidate who was not selected. It seemed sufficient to simply follow standard procedures and indicate the person(s) selected and to simply state that the others had not been selected.

It now appears this assumption was not the case. The rumor mill continues to grind out the rhetoric. There are now strong feelings in the Department that it is not being heard and is being forced into a position that is not desirable for the faculty, College, or the Department. This action is regretted deeply by the faculty. However, the long term health of Chemical Engineering is more important than individual or personal embarrassment. It is believed this embarrassment could have and should have been avoided. Because personal embarrassment does not appear to be an important issue here, this is not a time to be concerned about embarrassment, and the question is raised to those listening to the Advocate: how many involved in this process have studied the track record, the

interpersonal skills/relationships, the teaching and publication records, the research performed, the annual reviews and/or other contributions made to Mississippi State University by Dr. Alex Vadie. The faculty of Chemical Engineering have weighed these matters carefully and the following statements are made. It is noted again that putting these comments in writing are an embarrassment to the faculty and should not be necessary.

The faculty of Chemical Engineering and the Head of Chemical Engineering do NOT want Dr. Alex Vadie in this program. To the contrary, it would be highly counterproductive. Furthermore, we feel that our distinguished alumni, our Hall of Fame members such as Dave Swalm, Hunter Henry, and Earnie Deavenport, as well as our Patrons of Excellence would be less than pleased if we hired someone that would not make notable contributions to this Department and Mississippi State University. We also believe that our Corporate sponsors would not be pleased. We believe that being minimally qualified is not tantamount to being minimally acceptable. It is not in the long term interest of the Department of Chemical Engineering or the University to accept Dr. Vadie when candidates with much superior qualifications are available.

It is also our thesis that the problem under consideration is a University problem and not a Chemical Engineering problem. Consequently, Chemical Engineering should not be called upon to solve the entire University difficulty. We feel we have toiled diligently through a difficult problem and have made a major contribution to solving the overall problem and in fact were commended for our actions in the recent report by the grievance

committee. The faculty feel it is time to put these continuous accusations behind us and issue the invitation for a faculty position to Dr. Michael Harris. The faculty have toiled long, have performed in an exemplary manner, and are now being abused, which has brought us to the point that irritation and frustration are now being felt.

The faculty will appreciate a speedy solution to this problem that has been a burden since April 16, 1992, has caused undue hardship and heartache, and needs to be resolved in a satisfactory manner soon.

Sincerely,

/s/ Donald O. Hill
Donald O. Hill

/s/ Clifford George
Clifford George

/s/ Steve Gardner
Steve Gardner

/s/ Hai Kuo
Hai Kuo

/s/ Hossein Toghiani
Hossein Toghiani

/s/ Rebecca Toghiani
Rebecca Toghiani

/s/ George Lightsey
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